INDEX

CITATIONS

Cases—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 25

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS F. JOHNSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

The central issue in this case is whether the speech or debate clause—designed to foster untrammeled legislative representation of the interests of the electorate—prevents the prosecution of a congressman for the corrupt act of agreeing to take a bribe to make a speech in Congress. The first section of this brief is devoted to comments on respondent's arguments on this question and supplements our main brief, where our position is more fully developed. In the succeeding sections we briefly discuss the additional issues which respondent has asked this Court to reach. These additional issues were fully considered and, in our view, correctly disposed of in the court of appeals. Moreover, most of these points have been

considered at length in previous decisions of this Court—some of them very recent—and respondent's contentions have uniformly been rejected.

I

THE SPEECH OR DEBATE CLAUSE

Respondent does not, and cannot, dispute the point that, conceptually, the act of taking or agreeing to take money to make a speech is quite distinct from the speech itself and that, therefore, a prosecution for such an act need in no way "question" the speech. Respondent contends, however, that prosecutions such as this should be barred on the grounds that, as a practical matter, they inevitably call the motivation of the accused congressman into question and cannot help but have a chilling influence on free legislative speech. He further contends that, even if he is mistaken as to the practical effects of such prosecutions in general, in *this* case there was an undue questioning of his speech and its underlying motivation and a consequent intrusion upon the speech or debate privilege. In our view, neither of these contentions has merit.

1. The court below (see R. 301–302) took the position, which respondent adopts, that even though the government proves the unlawful agreement or the bribe, without relying on the contents of the speech or other official action, the accused congressman is necessarily obliged to explain his motives for the speech or action. It is contended that, in these circumstances, *Tenney* v. *Brandhove,* 341 U.S. 367,

requires the conclusion that no such prosecutions can be maintained. In our view, both premise and conclusion are incorrect. While the congressman charged with agreeing to take a bribe may be called upon, if he is to exonerate himself, to show his motivation in taking the money alleged and proved *prima facie* to have been a bribe, his motives for making the speech or taking any other official action have, at most, indirect relevance. Moreover, under respondent's theory, motivation does not enter the case until the government has made a *prima facie* showing of the offense charged. Thus, as we have previously shown (Govt. Br. 14–15), the situation here is significantly different from that in *Tenney,* in which the content and motives of official legislative conduct were the very foundation of the lawsuit.

In any event, as we argued in our main brief, the view that the privilege applies "whenever the motivation for making a speech is called into question" (R. 299) is too sweeping a formulation. This is sharply demonstrated by the arguments put forth in the Brief of Amicus Curiae (pp. 4–7). Thus, if respondent's analysis is carried to its logical conclusion, it would appear to follow that prosecutions of non-congressmen for offering bribes to congressmen would be barred on the ground that they would "necessarily" involve the prohibited "questioning" of legislative speech. Ironically, immunizing givers as well as receivers of congressional bribes would open the way for the resurrection, in modern dress, of the sale of "protections", perhaps the most venal of the numerous abuses of

legislative power which the framers of our Constitution undeniably intended to suppress (see Govt. Br. 34–35, particularly n. 41).[1]

Respondent's contention that permitting prosecutions of congressmen for agreeing to take bribes in return for speeches or other official acts would have a crippling effect on the legislative process has been decisively refuted by over a century of American history. Legislation proscribing the taking of bribes by members of Congress has been part of the Criminal Code since 1853 (Act of February 26, 1853, 10 Stat. 170); yet the threat of prosecution under these laws has not prevented congressmen from taking unpopular positions or expressing views that have seemed to some to represent narrow economic interests. The judicial privilege—which, although it has a different constitutional background, is essentially the same as the speech or debate privilege in that neither the con-

[1] As our main brief establishes (pp. 19–25), there is nothing in the English history of the development of the speech or debate privilege to indicate that the privilege was intended to bar prosecutions for bribery. There is no warrant for respondent's assertion—without any citation of authority (R. Br. 37–38, 46, 50, 52)—that Strode's case in 1512 shows the opposite. Not only did the prosecution of Strode arise out of his official conduct, but nothing in the historical material indicates that any "financial interest" of his, if such there was, was in any way involved in the action taken by Parliament to assert its privilege of free speech and debate. Nor is the English history as clear as respondent would have it (R. Br. 45, n. 44) on the proposition that only Parliament could punish a bribe-taking member (see Govt. Br. 33, n. 39). But even if it were clear, the precedent would not be controlling in light of the differences underlying the development of the American Congress and the English Parliament (see Govt. Br. 33–34).

tent nor motive of a judicial opinion can be "questioned"—has never been held to bar prosecutions of corrupt judges for taking bribes. And the fact that there have occasionally been such prosecutions has surely not prevented American judges from deciding cases as they see fit—without regard to the decision's popularity with the executive or legislative branch. It is true that, in the normal course of political life, congressmen legitimately receive campaign contributions, and that, therefore, there is somewhat more likelihood that unfounded charges of taking bribes might be brought against a congressman than against a judge. In our view, however, the independence repeatedly evinced by members of Congress—unaffected by the existence of the Federal bribery statute—coupled with the dearth of prosecutions in this field, show that the increased danger is negligible. It cannot be denied that there is a discernible difference between a bribe and a campaign contribution. Congress itself surely recognized the distinction in making bribe-taking by its members an indictable offense, and there is no reason to believe that Federal prosecutors and grand and petit jurors are incapable of making the same distinction.

As pointed out in the leading case of *Coffin* v. *Coffin,* 4 Mass. 1, 27, the central purpose of the speech or debate clause was not to protect legislators "against prosecutions for their own benefit, but to secure the rights of the people * * *." Considering that accepting money to give a legislative speech subverts the normal legislative process—which the speech or

debate clause was designed to protect—and that the framers repeatedly expressed fears of legislative excess (see Govt. Br. 27–30), there are strong indications that the speech or debate clause was not intended to protect a congressman who violates his public trust by agreeing to accept a bribe to make a speech in Congress.[2]

Respondent's argument that, even if the privilege does not extend to prosecutions for bribery, it should cover prosecutions under 18 U.S.C. 371, is without substance.[3] Both the district court (App. 56) and the court of appeals (R. 301) ruled that, for the purpose of determining the applicability of Article I, Section 6, there is no material difference between a prosecution for accepting a bribe and one for conspiracy to defraud the United States by accepting a bribe. Indeed, respondent's own arguments for extending the speech or debate privilege to bar the present prosecution are so broad as to encompass a prosecution on the substantive charge of accepting bribery as well. There is no basis for respondent's allegations that the government relied upon an undefined,

[2] Contrary to respondent (R. Br. 50–52), nothing in *Ex parte Wason*, 4 Q.B. 573 (1869), contradicts this principle (see Govt. Br. 25–26). *Wason* merely holds that a charge that the defendants "did conspire to deceive the House of Lords by [untrue] statements made in the House of Lords" is not judicially actionable (opinion of Cockburn, J., 4 Q.B. at 575). None of the opinions in that case suggests, however, that a venal anterior agreement to take legislative action is immunized from prosecution under the speech or debate privilege.

[3] Respondent raises other issues relating to the conspiracy count. For clarity, those not directly tied to the speech or debate argument are considered under a separate heading (see *infra*, pp. 9–12).

"open-ended" and "protean" conspiracy in order "to circumvent" the more precise substantive bribery provisions (R. Br. 91–94).[4] The indictment merely reflected the nature of the offense charged; *i.e.*, a single agreement to corrupt respondent in several ways. Under this indictment, as with a charge brought under the bribery statute, the gravamen of the offense is an antecedent corrupt agreement to perform an official act for compensation. Where, as here, a continuing course of conduct rather than a single bribe is involved, use of Section 371 consistently has been deemed appropriate. See, *e.g.*, *Glasser* v. *United States*, 315 U.S. 60, 66; *May* v. *United States*, 175 F. 2d 994 (C.A.D.C.), certiorari denied, 338 U.S. 830; *United States* v. *Manton*, 107 F. 2d 834 (C.A. 2), certiorari denied, 309 U.S. 664.

2. Respondent contends that the speech was so involved in the conduct of his trial as to offend the speech or debate privilege. Even if this allegation were well founded, it would not sustain the decision below that respondent is altogether immune from pros-

[4] There is no merit in respondent's contention that this action could not have been maintained under the bribery statute as it read at the time of the offense. When Congress provided for punishment of any congressman who receives or agrees to receive money "with the intent to have his action, vote, or decision influenced on any question, matter, cause, or proceeding, which may at any time be pending in either House of Congress or before any committee thereof, or which by law may be brought before him in his capacity as such Member" (18 U.S.C. 205 (1958 ed.)), it is clear, we submit, that it intended to cover the receipt of money for a speech on the floor of Congress as to any subject which could be within congressional competence. See 18 U.S.C. 201 (1964 ed.).

792-897—65——2

ecution. In any event, the contention is without merit. As we demonstrated in our main brief (pp. 16–17), the government met its burden of proof independent of the speech or any inferences therefrom.[5] The testimony cited by respondent (R. Br. 48, 67–68 n. 59) does not show the contrary. The government witnesses he refers to either did not testify about the speech at all or, if they did, did not testify as to the content or the giving of the speech. The reprint of the speech introduced by the government was not used to show the contents of the speech (App. 258–260) and indeed was materially different from the official copy, introduced by respondent (App. 470), in that the reprint bore a special caption inserted for the use, and at the request, of the savings and loan associations (App. 259, 493, 931).

The indictment did not focus impermissibly on the contents of the speech. Paragraph 15 charged that

[5] Although not attacking the court of appeals' express finding that "the evidence [was] sufficient to support a guilty verdict on all counts" (R. 326), respondent complains of the reference by the court and the government to testimony given by witnesses Goldman and Raines which was initially admitted only against co-defendants Robinson and Edlin (R. Br. 10, 82–83; see Tr. 168–172, 421, 429). But reference to this testimony by the court of appeals reflects no misapprehension of the evidence, since it was made in the course of the court's discussion of the sufficiency of the evidence against *all* the defendants (R. 315–320). Moreover, respondent's attorney himself, in cross-examining Raines, referred to Raines' previous testimony, of which he now complains (Tr. 309) and, in cross-examining Mrs. Goldman, had her repeat her testimony as to her conversation with Edlin (Tr. 465). And in his argument to the jury, respondent's attorney referred to both the statements by Mrs. Goldman which he presently questions (Tr. 5928–5929).

among the services respondent agreed to render in exchange for compensation was the making of a floor speech defending independent savings and loan associations (App. 5–6). This reference to the contents of the speech respondent agreed to make was merely descriptive of the service to be performed. It is plain that the charge was founded on the corrupt agreement and not on the contents of the speech. Nor did the district court, in its instructions, focus "the attention of the jury upon Johnson's speech * * * in as definitive a way as was possible" (R. Br. 69). The single sentence from the court's lengthy instructions relied on by respondent was expressly made applicable "particularly to the Defendant Boykin", for whose benefit it was given (App. 93–94). In that portion of the charge, the court merely pointed out that, in case the jury found that the conspiracy relating to the speech was separate from that relating to the Department of Justice, there was no evidence to show that Boykin participated in the first conspiracy.

II

OTHER CHALLENGES TO THE CONSPIRACY COUNT

1. Respondent argues (R. Br. 86–96) that the interpretation given to the word "defraud" (as it appears in 18 U.S.C. 371) by *Hammerschmidt* v. *United States,* 265 U.S. 182, and *Haas* v. *Henkel,* 216 U.S. 462, should now be overruled. But, as the Reviser's Note to Section 371 shows, Congress has fully recognized and accepted the broad interpretation that this

Court adopted. Pointing to a change in the statutory language which was made "[t]o reflect the construction" of the Act in cases such as *Haas,* the Reviser quotes from the opinion in that case as follows: "The statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing, or defeating the lawful functions of any department of government" (216 U.S. at 479). This reading of the conspiracy statute, reaffirmed and refined in *Hammerschmidt, supra,* at 188, and approved by Congress, unquestionably embraces the conspiracy charged here. See *May* v. *United States,* 175 F. 2d 994 (C.A.D.C.), certiorari denied, 338 U.S. 830; *United States* v. *Manton,* 107 F. 2d 834 (C.A. 2), certiorari denied, 309 U.S. 664; see also *United States* v. *Vasquez,* 319 F. 2d 381 (C.A. 3); *United States* v. *Bowles,* 183 F. Supp. 237, 246–247 (D. Me.) and cases there collected.[6]

Contrary to respondent (R. Br. 89–90, 92), this long-standing construction of Section 371 does not re-

[6] Respondent's reliance (R. Br. 73–75) on *United States* v. *Gradwell,* 243 U.S. 476, is misplaced. In that case, the charge, *inter alia,* was conspiracy to defraud the United States by bribery of voters in a federal election. This Court held the predecessor of Section 371 inapplicable on the grounds that Congress had "clearly established" its purpose of entrusting the conduct of federal elections to State law and that the conspiracy statute was concerned with "'*Offenses against the Operations of the Government*' as distinguished from the processes by which men are selected to conduct such operations" (243 U.S. at 485; emphasis supplied). Moreover, even this distinction drawn in *Gradwell* has been undermined by more recent decisions in this Court. *United States* v. *Saylor,* 322 U.S. 385; *United States* v. *Classic,* 313 U.S. 299.

sult in "an unpublished penal code of ethics by judicial fiat." The government plainly has the right to "safeguard itself against being defrauded out of its right to administer an intelligent and honest service in the interests of the people." *Curley* v. *United States,* 130 Fed. 1, 9 (C.A. 1), certiorari denied, 195 U.S. 628. Surely, when the means of interfering with this interest are alleged to have been the giving or accepting of a bribe, neither the giver nor the receiver can have any reasonable doubt of the impropriety of his action.

2. The conspiracy count is not vague, indefinite or complex (see R. Br. 76–86). It charged respondent and his co-defendants with entering an agreement to defraud the United States of its governmental functions in two ways: (1) by having Congressman Johnson make a speech in Congress for money and, (2) by having Congressmen Johnson and Boykin, also in exchange for compensation, utilize their official positions to have the Department of Justice dismiss an indictment. The nature and scope of this charge are not, as respondent claims, to be determined solely from an examination of paragraph 14 of the indictment, which states, in general terms, the governmental rights and functions adversely affected by the conspiracy (see App. 3–5). Rather, as the trial court specifically charged (App. 91), paragraph 14 is to be read together with paragraphs 15 through 25 (App. 5–9), which set forth in particularity the objects and purposes of the conspiracy and detail the means employed to achieve them. Read in its entirety, the conspiracy count fairly informed the defendants of the offense with

which they were charged and was such that they could successfully plead former jeopardy in the event of a second prosecution. In these circumstances, the court below (R. 294) and the district court (App. 57–60) correctly held that the conspiracy count was, in the language of Rule 7(c), Fed. R. Crim. P., "a plain, concise and definite written statement of the essential facts constituting the offense charged." See *Hagner* v. *United States,* 285 U.S. 427, 431; *United States* v. *Debrow,* 346 U.S. 374, 376.[7]

III

PRODUCTION OF GRAND JURY MINUTES

A few days before the trial, Francis Finneran—then a potential government witness, but in fact called as a defense witness at the trial (Tr. 5019)—appeared with his attorney at the United States Attorney's office. Because Finneran thought "it would refresh his recollection" (Tr. 9), he and his attorney were permitted to examine, for approximately thirty minutes, the volume of grand jury minutes containing his own testimony and that of his employee, Walter Schultise. It is possible that they also examined the testimony of one James L. Dixon, without the gov-

[7] Respondent's reliance on a portion of a pre-trial colloquy between the trial court and government counsel (R. Br. 79–80) for the proposition that the government did not believe its proof on the conspiracy count would have to be limited to the specifications of paragraphs 15–25 wholly disregards the government's concession, recognized by the trial court (App. 60), "that it will not attempt to prove any purposes and objects of the conspiracy except those set out in paragraphs 15 to 25."

ernment's consent (Tr. 8–10, 21, 62–63).[8] After ascertaining these facts and hearing counsel (Tr. 8–33), the trial court denied the defense motion that it dismiss the indictment or order pre-trial disclosure of "the entire transcript of the testimony of all witnesses submitted before the Grand Jury by the Government" (Tr. 17, 61–66). The court did, however, direct the government to furnish defense counsel with the grand jury testimony of Finneran, Schultise and Dixon. It ruled further that, if it later developed that Finneran or his counsel had examined the testimony of any other grand jury witness, it would promptly consider broadening its ruling (Tr. 63–64).[9]

The relief granted by the district court was plainly appropriate. The spectre of the government's carefully selecting favorable portions of the grand jury testimony to reinforce prosecution witnesses, conjured by respondent (R. Br. 110–112), finds no basis in this record.[10] Indeed, the witness whose memory supposedly was jogged or whose confidence bolstered

[8] The volume they examined was 182 pages in length and contained, in addition, the testimony of four other grand jury witnesses (Tr. 24–25). None of these witnesses (including Schultise and Dixon) testified at trial.

[9] As the trial court found (Tr. 63), there was no evidence to support the claim that any other witness' testimony had been read by Finneran or his attorney, and respondent does not make this claim here.

[10] The district court specifically refused to rule whether, by disclosing the minutes to Finneran, the United States Attorney had violated the secrecy requirement of Rule 6(c), Fed. R. Crim. P. (Tr. 64). However, the court had indicated earlier that, in its view, government counsel was not guilty of any impropriety (Tr. 13–15, 18).

by having seen part of the grand jury minutes was not called to testify for the government, but for the defense. Manifestly, the defense failed to carry the burden of showing a "particularized need" for any additional grand jury testimony, much less for all of it. See *Pittsburgh Plate Glass Co.* v. *United States,* 360 U.S. 395, 400; *United States* v. *Procter & Gamble,* 356 U.S. 677, 683.[11]

Respondent's broader, apparently constitutional, claim that fairness always requires pre-trial disclosure of all grand jury testimony is also without substance. As the court below pointed out, secrecy is not maintained for the benefit of the government but "for the benefit of the grand jury and for the betterment of grand jury proceedings" (R. 314–315). The notion of wholesale discovery "runs counter to 'a long-established policy' of secrecy * * * older than our Nation itself." *Pittsburgh Plate Glass, supra,* at 399. Respondent submits no reasons for departing from this principle which were not very recently considered and rejected by this Court in *Pittsburgh Plate Glass* and *Procter & Gamble, supra.*

IV

PRODUCTION OF AGENTS' NOTES UNDER 18 U.S.C. 3500

As rebuttal witnesses, the government called F.B.I. agent Milne, who described an interview he had with respondent's administrative assistant, Manuel Buar-

[11] It is noteworthy that respondent has abandoned his theory of "particularized need" presented to, and properly rejected by, the courts below (see R. 313–314).

que (Tr. 5468–5471), and F.B.I. agent Strickland, who testified as to his interview with co-defendent Robinson (Tr. 5476–5481). On cross- and re-direct examination, both agents stated that they had taken notes at these interviews, but that these were destroyed in accordance with F.B.I. procedure after they had been used to prepare formal reports (Tr. 5473–5475, 5479–5482, 5484–5485). Agent Strickland's report—which the agent said was a "verbatim copy" of what Robinson had told him (Tr. 5484)—was prepared at the time of the interview and was shown to Robinson, who made some corrections and signed it. This report was made available to the defense (Tr. 5479–5480). Agent Milne, whose report was also turned over to defense counsel for use at trial (Tr. 5472–5473), testified that he had dictated the report from his notes, and that the notes were destroyed after he had carefully proofread the interview report for accuracy and initialed it (Tr. 5475; see Tr. 5473–5474). The district court denied the defense motion to strike both agents' testimony (Tr. 5474, 5486–5487).

Even if the notes in question were producible "statements" under 18 U.S.C. 3500—which, we submit, they were not—it is clear that their destruction was not improper. Consequently, there would be no warrant for excluding the agents' testimony. This Court's ruling in *Killian* v. *United States,* 368 U.S. 231, 242, is fully applicable here:

> As to petitioner's contention that the claimed destruction of the agents' notes admits the destruction of evidence, deprives him of legal rights and requires reversal of the judgment,

> it seems appropriate to observe that almost everything is evidence of something, but that does not mean that nothing can ever safely be destroyed. If the agents' notes of [the witness'] oral reports of expenses were made only for the purpose of transferring the data thereon to the receipts to be signed by [the witness], and if, after having served that purpose, they were destroyed by the agents in good faith and in accord with their normal practice, it would be clear that their destruction did not constitute an impermissible destruction of evidence nor deprive petitioner of any right. * * *

See also *United States* v. *Hilbrich,* 341 F. 2d 555, 557 (C.A. 7), certiorari denied, 381 U.S. 941; *Ogden* v. *United States,* 323 F. 2d 818, 820–821 (C.A. 9), certiorari denied, 376 U.S. 973; *United States* v. *Greco,* 298 F. 2d 247, 249–250 (C.A. 2), certiorari denied, 369 U.S. 820.[12]

Although, in the circumstances, the question whether the notes are producible under Section 3500 need not be reached, we wish to point out that the court below was correct in ruling (R. 322–323) that

[12] *Campbell* v. *United States,* 373 U.S. 487, relied on by respondent (R. Br. 123), in no way undermines *Killian.* There, unlike the situation here and in *Killian,* the "precise words" in the destroyed notes were read to the interviewee, who "had adopted this presentation" as his own (373 U.S. at 491–492). The Court in *Campbell* found it unnecessary to decide whether the sanction of 18 U.S.C. 3500(d) should apply, but pointed out that the agent's interview report, which was essentially a copy of the notes, would be available to the defense upon a new trial (see 373 U.S. at 491, n. 5, 495, n. 10).

the plain language and clear intent of the Act foreclose respondent's contention that the agents' notes were producible as "statements" of defendant Robinson and defense witness Buarque. Nor, as the court below ruled (R. 323), may the notes be considered as producible "statements" of the F.B.I. agents. The statute expressly provides only for the production of a "statement or report [as defined by Section 3500(e)(1) and (2)] in the possession of the United States which was made by a Government witness * * * (other than the defendant) *to an agent of the Government* * * *." [Emphasis supplied.] Personal work notes such as were involved here, retained by the interviewer and not communicated to any other government agent, are not within the reach of the statute.[13] The legislative history and case law supporting this view are set forth at length in the government's brief in *Needelman* v. *United States,* No. 278, O.T. 1959, pp. 17–31, certiorari dismissed as improvidently granted, 362 U.S. 600.

[13] Of course, an agent's notes may be the "statement" of a government witness when they embody the witness' communication to the agent and also meet the standards of Section 3500(e)(1) and (2). Production of such notes, unlike the notes involved here, fulfills the congressional purpose of providing a communicated statement, attributable to the declarant, to test the declarant's credibility on cross-examination. See *Palermo* v. *United States*, 360 U.S. 343, and the government's brief in *Needelman*, *supra*.

V

THE SUBSTANTIVE COUNTS

An examination of the relevant portions of the trial court's instructions on the substantive counts [14] (App. 99–105) refutes respondent's claim (R. Br. 125–131) that the court improperly focused on Edlin's intent in paying respondent rather than on respondent's intent in receiving the money. At several points in his charge on this issue, the trial judge made clear that, in order to convict respondent under 18 U.S.C. 281, the jury had to find that he knowingly received compensation for his services before the Department of Justice (App. 102–104). In this context, it is frivolous to suggest that the one occasion where the word "given" was used instead of "received" (App. 103), fatally prejudiced respondent (see opinion of the court of appeals, R. 325).

[14] In our petition for a writ of certiorari (p. 11, n. 5) we expressly reserved the right to argue that reversal of the conviction on the conspiracy count because of the speech or debate clause does not require reversal of the conviction on the substantive counts, which in no way involved the speech. In light of respondent's discussion of the substantive counts, we wish to make clear that our decision not to argue that point in our brief on the merits was based solely on the ground that that issue was not one of general importance. We continue to disagree with the court of appeals' reversal of respondent's conviction on the substantive counts. In our view, the evidence, arguments and instructions as to the two types of counts were clearly distinct, and there was no prejudice to the respondent in the trial of this case.

CONCLUSION

For the foregoing reasons and the reasons set forth in our main brief, it is respectfully submitted that the judgment of the court of appeals should be vacated and the judgment of conviction reinstated on all counts.

THURGOOD MARSHALL,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
JEROME I. CHAPMAN,
Assistant to the Solicitor General.
BEATRICE ROSENBERG,
JEROME M. FEIT,
Attorneys.

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